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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PHONG THANH TRAN, Defendant and Appellant.	G051907 (Super. Ct. No. 14CF2804) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Beatriz M. Gordon, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette Cavalier and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of unlawfully driving or taking a vehicle and two counts of receiving stolen property. (Veh. Code, § 10851, subd. (a); Pen. Code, §§ 496d, subd. (a) & 496, subd. (a).)[1] On appeal, he contends: 1) he was improperly convicted of stealing and receiving the same property; 2) he should have only been convicted of one count of receiving stolen property; 3) Proposition 47 applies to two of his convictions; and 4) the police violated his *Miranda* rights (see *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)) by not explaining them to him in Vietnamese. We reject these contentions and affirm the judgment.

FACTS

On the night of August 23, 2014, appellant and two of his accomplices stole a 2006 Mercedes from a shopping center in Santa Ana. That same evening, police tracked the car to a house in Garden Grove where they saw appellant sitting in the vehicle in the driveway. When appellant exited the car, an officer approached him and told him to halt. Appellant stopped, turned around and threw an object into the bushes. The object turned out to be a phone that belonged to the car owner's girlfriend and was in the car at the time it was stolen.

When questioned at the scene, appellant claimed the car belonged to a friend. After he was arrested and taken into custody, though, he admitted stealing the car with his two accomplices. He said they drove the vehicle to the house in Garden Grove to purchase cocaine. When they arrived there, they parked on the street, but later appellant moved the car into the driveway because it was parked illegally. According to appellant, that was the only time he drove the vehicle. He admitted he and his cohorts switched the car's plates to avoid police detection.

Following a jury trial, appellant was convicted of unlawfully driving or taking a vehicle, receiving a stolen vehicle, and receiving stolen property (the phone). He

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1 Unless noted otherwise, all further statutory references are to the Penal Code.

was also found to have served three prior prison terms. The trial court sentenced him to seven years in prison.

DISCUSSION

Propriety of Dual Convictions for Unlawfully Driving or Taking a Vehicle and Receiving a Stolen Vehicle

Appellant was convicted in count 1 of violating Vehicle Code section 10851, which states, "Any person who drives *or* takes a vehicle not his or her own, without the consent of the owner thereof, and with the intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle . . . is guilty of a public offense[.]" (Veh. Code, § 10851, subd. (a), italics added.) Thus, the offense may be predicated on the theory that the defendant either drove *or* took the subject vehicle. (*People v. Garza* (2005) 35 Cal.4th 866, 871.) In count 2, appellant was convicted of violating section 496d, which makes it crime for a person to receive, conceal, or withhold a stolen vehicle which he knows has been stolen. (§ 496d, subd. (a).)

It is well established that a defendant cannot be convicted of stealing and receiving the same property. (*People v. Garza*, *supra*, 35 Cal.4th at p. 874.) Consistent with this rule, appellant's jury was instructed it could not find appellant guilty of count 2 for receiving the stolen Mercedes if it believed he was guilty of count 1 for taking it. The prosecutor explicitly acknowledged as much in her closing argument. However, based on appellant's statement that he did not drive the vehicle until well after it was stolen (when he moved it from the street to the driveway), the prosecutor argued appellant was guilty of count 1 for driving the vehicle, and therefore the jury could convict him of both counts 1 and 2, and ultimately that is what it did.

Appellant contends dual convictions were improper because the evidence failed to establish his receipt of the stolen vehicle was completely divorced from the theft of the vehicle. The "complete divorcement" requirement is applicable in cases where the

defendant is convicted of both stealing and receiving the same property. (*People v. Garza*, *supra*, 35 Cal.4th at pp. 874-875.) But in this case, it is apparent from the jury's verdict appellant was convicted on count 1 for unlawfully *driving*, not taking, the victim's car. Under those circumstances, the rule barring convictions for both stealing and receiving the same property is inapt, and the complete divorcement requirement does not come into play. (See *id*. at pp. 880-881; *People v. Cratty* (1999) 77 Cal.App.4th 98, 103; *People v. Strong* (1994) 30 Cal.App.4th 366, 375; *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252.) Therefore, appellant's convictions on both counts 1 and 2 were proper.

Propriety of Dual Convictions for Receiving a Stolen Vehicle and Receiving Stolen Property

Appellant also contends he was improperly convicted of counts 2 and 3. As explained above, count 2 was based on appellant receiving, concealing, or withholding the stolen Mercedes. (§ 496d, subd. (a).) And count 3 was based on appellant receiving, concealing, or withholding stolen property that was inside the Mercedes, i.e., the cell phone. (§ 496, subd. (a).) Appellant correctly points out that a single act of receiving property that was stolen from multiple victims constitutes but one offense of receiving stolen property. (*People v. Lyons* (1958) 50 Cal.2d 245, 275, overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1.) He argues that principle compels reversal of count 3 because he received the phone at the same time he received the Mercedes.

Appellant may have initially obtained the Mercedes and the phone at the same time. Indeed, the evidence makes clear the phone was inside the car at the time it was taken. However, in closing argument the prosecutor relied on appellant's actions in concealing, not receiving, the car as the basis for his guilt on count 2. Specifically, the prosecutor asserted appellant was guilty of count 2 because he and his companions concealed the car from the police by changing its license plates. Since appellant's receiving convictions were not based on a single act of receiving different items of stolen

property at the same time, but instead arose from different acts that occurred at different times, he was properly convicted of both counts 2 and 3.

Proposition 47

At the conclusion of the prosecution's case, appellant moved to reduce all three counts from felonies to misdemeanors pursuant to Proposition 47 on the basis there was no evidence the value of the Mercedes or the phone exceeded $950. The trial court granted the motion as to count 3, which involved the phone. However, the court denied the motion with respect to counts 1 and 2, saying "it can be reasonably inferred that the value of the 2006 silver, four-door Mercedes Benz did exceed [$]950." Appellant contends the court's ruling was erroneous because the prosecution failed to prove the car was worth more than $950. We uphold the ruling.

Proposition 47 was passed and became law in November 2014, five months before appellant was tried. The statutory scheme it ushered in allows defendants who have been convicted of a felony to apply for resentencing if the offense was based on conduct that amounts to one of the misdemeanors enumerated in the statute. (§ 1170.18.) More specifically, Proposition 47 applies to defendants who are "currently serving a sentence" or have "completed" their sentence for a felony conviction. (*Id*., subds. (a) & (f).) In this case, appellant made his Proposition 47 motion during his trial, *before* he was convicted of a felony offense. Thus, he was not eligible for relief under the statute.

That might sound like a technicality, but it pertains importantly to appellant's broader argument. He contends that because his charges were based on conduct that arguably falls within two of the misdemeanor offenses listed in Proposition 47 – petty theft of property valued at $950 or less (§ 490.2) and receiving stolen property valued at $950 or less (§ 496, subd. (a), as amended by Proposition 47) – the prosecution had the burden to prove otherwise. In other words, the prosecution had to establish the value of the car he and his friends took and received was greater than $950.

This argument overlooks the fact appellant was not charged with any misdemeanor offenses. Rather, he was charged with felony violations of Vehicle Code section 10851 and receiving stolen property. Thus, as far as the prosecution was concerned, it was only required to prove the elements of *those* offenses. It was not required to disprove appellant's eligibility for relief under Proposition 47. In fact, as we have pointed out, strictly speaking, appellant was not even eligible for Proposition 47 relief when he made his motion. Therefore, the prosecution was not required to prove anything in terms of attempting to defeat the motion.

Appellant asserts due process and equal protection concerns compel a different conclusion. However, as the courts have unanimously determined, there is nothing unfair or unconstitutional about requiring the defendant to carry the burden of proving his entitlement to relief under Proposition 47, particularly regarding the value of the property he stole or received. (*People v. Johnson* (2016) 1 Cal.App.5th 953; *People v. Bush* (2016) 245 Cal.App.4th 992; *People v. Perkins* (2016) 244 Cal.App.4th 129; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444; *People v. Sherow* (2015) 239 Cal.App.4th 875.) Indeed, appellant could have easily supplied that information by way of his own testimony or other admissible evidence. (*Ibid*.) The value of a heavily-traded commodity should not be difficult to establish. Because appellant failed to carry his burden in that regard, we have no occasion to disturb the trial court's ruling.

Miranda Waiver

Lastly, appellant claims he did not knowingly and intelligently waive his *Miranda* rights before confessing at the police station. The claim is based on the fact the police read appellant his *Miranda* rights in English, as opposed to his native Vietnamese, but we find appellant's confession was properly admitted into evidence.

The applicable law is well established. "[T]o counteract the coercive pressure inherent in custodial surroundings, '. . . police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an

attorney. [Citation.] After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. [Citation.] . . . Critically, however, a suspect can waive these rights. [Citation.] To establish a valid waiver, the [s]tate must show that the waiver was knowing, intelligent, and voluntary under the 'high standar[d] of proof for the waiver of constitutional rights . . . .' [¶] 'The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence.' [Citations.] In addition, '[a]lthough there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was [voluntary,] knowing[,] and intelligent under the totality of the circumstances surrounding the interrogation.' [Citation.] On appeal, we conduct an independent review of the trial court's legal determination and rely upon the trial court's findings on disputed facts if supported by substantial evidence. [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 425.)

At the *Miranda* hearing in this case, appellant testified with the assistance of a Vietnamese interpreter. He said he was born in Vietnam and attended school there up until the third grade. In 1992, when he was 20 years old, he came to the United States and lived with his parents in California. He took an English language class, obtained a California driver's license and also met his wife, who speaks English. He and his wife moved to Iowa and then New Hampshire where they worked respectively as meat cutters and cell phone assemblers. Upon returning to California, appellant worked steadily in the construction industry. He has been married three times and has 10 children, including his stepchildren.

Despite having lived in the United States for 22 years when the present case arose, appellant testified he does not understand English and can only speak it a little bit. Thus, when he was Mirandized and interviewed in English at the police station by Officer James Marquez, he had no idea what Marquez was saying to him. Appellant also

claimed Marquez gave him some sort of form to sign, and he signed it without knowing what it said.

Marquez testified he did not attempt to obtain a written *Miranda* waiver from appellant. Rather, he orally advised appellant of his *Miranda* rights in English. In particular, Marquez advised appellant he had the right to remain silent, anything he said could be used against him in court, he had a right to have an attorney present during questioning, and if he could not afford an attorney one would be appointed to him. After stating each right, Marquez asked appellant if he understood what it meant, and appellant said yes. Appellant did not appear to have any difficulty understanding Marquez, nor did he ask for a Vietnamese interpreter. Moreover, as the interview progressed, appellant provided detailed and specific responses to Marquez's questions about his role in the purported auto theft. Appellant also admitted he had been arrested for prior vehicle thefts. In fact, the court took judicial notice of guilty pleas appellant entered in two prior cases. The pleas were memorialized on forms that were written in English but were translated to appellant in Vietnamese by court certified interpreters.

In arguing appellant did not understand his *Miranda* rights, defense counsel made much of the fact that his prior plea forms were interpreted in Vietnamese for him. However, the trial court did not believe that was particularly telling of appellant's ability to understand English because courts often error on the side of caution in appointing interpreters if there is any question as to the defendant's proficiency in English. In the trial court's view, the plea forms actually undermined appellant's *Miranda* claim because they reflected his prior exposure to and understanding of his legal rights, even though they were explained to him in Vietnamese. The trial court also noted that during his cross-examination, appellant began answering some of the prosecutor's questions before the interpreter even started to interpret them for him. And, he appeared to have no difficulty understanding English when the police questioned him at the scene and while he was in custody. In the end, the court simply did not believe appellant's claim he

lacked the ability to understand his *Miranda* rights when Marquez read them to him in English. Instead, the court was convinced by a preponderance of the evidence that appellant knowingly and intelligently waived those rights.

This finding is supported by substantial evidence. Given appellant's background and everything he said in connection with this case, including his affirmative responses when asked if he understood his *Miranda* rights, we have no occasion to disturb the trial court's ruling. Exercising our independent judgment on this issue, we conclude appellant validly waived his *Miranda* rights, and his pretrial statements were properly admitted into evidence.

DISPOSITION

The judgment is affirmed.

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BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.